

## REPORT

Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.  
*Robert B. McKay, 1990*

The ABA Standing Committee on Client Protection (“the Committee”) recommends that the American Bar Association adopt the *Model Court Rule on Insurance Disclosure* (“the Model Court Rule”).

### OVERVIEW

The ABA *Model Court Rule on Insurance Disclosure* requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer’s representation in order to make an informed decision about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client’s ability to determine whether a lawyer is insured. While the Model Court Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer. The information reported by lawyers will be made available by such means as designated by the highest court in the jurisdiction. While this information could be sought during the initial retention process, many clients are unsophisticated and may be reluctant to raise such issues.

Paragraph A of the Model Court Rule requires a lawyer to disclose on the annual registration statement whether professional liability insurance is maintained. Excluded from the Rule’s reporting requirement are those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. A lawyer who is employed to represent an organization on an ongoing basis generally represents a knowledgeable and sophisticated client. Additionally, organizational or governmental clients may have their own professional liability insurance policies.

Finally, Paragraph A places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer’s conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period.

Paragraph B of the Model Court Rule requires lawyers to certify to the accuracy of the information reported. Paragraph B also requires that the information submitted by lawyers will be made available by such means as designated by the highest court. For example, in Nebraska and Virginia, information regarding a lawyer’s professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars’ websites. (See, [www.vsb.org](http://www.vsb.org), under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). It was reported to the Committee that this Virginia Bar website receives 1250 visits per month.

Paragraph C of the Model Court Rule clarifies that failure or refusal to provide the required information would result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the Model Court Rule. The Committee is not recommending that a court amend its current Rules of Professional Conduct. Failure or refusal to make the required disclosure would, therefore, not be considered a disciplinary offense. Nevertheless, providing *false* information in response to the Model Court Rule would subject the lawyer to appropriate disciplinary action, pursuant to ABA *Model Rules of Professional Conduct*, Rule 8.4(c), that prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation."

## **INSURANCE REPORTING REQUIREMENTS IN UNITED STATES JURISDICTIONS**

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Committee's proposed Model Court Rule is patterned after the reporting requirements in these jurisdictions.

The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Rule in South Dakota, effective January 1, 1999, is the most comprehensive.<sup>1</sup>

In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.

## **EXISTING ABA POLICIES**

On three previous occasions, the American Bar Association has adopted policies requiring lawyers in some circumstances to maintain professional liability insurance. In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as client protection measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services*. Rule 4 of the *Model Rules* requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and

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<sup>1</sup> Rule 1.4 of the South Dakota Rules of Professional Conduct requires South Dakota lawyers to promptly disclose to their clients if they do not maintain professional liability insurance with limits of at least \$100,000, or if during the course of the representation, the insurance policy lapses or is terminated, lawyers shall disclose to their clients by including a component of the lawyers' letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." The required disclosure is to be included in every written communication with clients. Rule 7.5 (Firm Names and Letterheads) of the South Dakota Rules of Professional Conduct provides that the disclosure *shall be in black ink with type no smaller than the type used for showing the individual lawyer's names*.

omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA *Minimum Quality Standards* for lawyer referral services (*See* above.). The Comment notes, that only by requiring such insurance, or a showing of financial responsibility, can a client best be protected. In states where lawyer referral services are not immune from lawsuits for negligent referral, this requirement will help protect the lawyer referral service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the lawyer.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants*. The Model Rule sets forth the requirements for a foreign lawyer to practice law as a foreign legal consultant in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

### **THE PROPOSED MODEL COURT RULE ON INSURANCE DISCLOSURE**

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. Potential clients should not be required to inquire of a lawyer if professional liability insurance is maintained. Many unsophisticated clients either assume that a lawyer is required to provide malpractice insurance or do not even think to inquire if they lawyer is covered.<sup>2</sup> The proposed Model Court Rule would provide potential clients with the ability to independently determine whether a lawyer maintains professional liability insurance. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide

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<sup>2</sup> A Minnesota lawyer reported to the Committee that based upon his experience in handling legal malpractice actions since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. He further stated that it is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.

whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Lawyers who lack insurance are not immune from malpractice liability. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. Plaintiff's counsel know that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim for damages is modest, many plaintiff's legal malpractice lawyers will elect not to file suit because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. The data on malpractice claims reported by the ABA Standing Committee on Lawyers' Professional Liability is incomplete since potential claims not pursued due to a lack of insurance are not factored.<sup>3</sup>

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase "tail" coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.

The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. Alaska, New Hampshire and Ohio require lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000 per claim and \$300,000 annual aggregate.<sup>4</sup>

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<sup>3</sup> Data has been collected on legal malpractice claims from the National Association of Bar-Related Insurance Companies and commercial insurers for the period January 1, 1996 through December 31, 1999. During that period, there were reported to be 36,844 legal malpractice claims nationally. This data did not cover the entire lawyer population: a significant percentage of practicing lawyers have no malpractice coverage and not all U.S. malpractice insurers provided data. *Profile of Legal Malpractice Claims, 1996-1999*, American Bar Association, Standing Committee on Lawyers' Professional Liability.

<sup>4</sup> Alaska Court Rules, Rule 1.4 (c), Alaska Rules of Professional Conduct; Rule 1.17, New Hampshire Rules of Professional Conduct; and Ohio Rules of Court, Code of Professional Responsibility, DR 1-104.

South Dakota requires its lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000.<sup>5</sup> The Committee was also advised that a professional liability insurance policy with limits of liability of \$200,000/600,000 is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.<sup>6</sup>

## **CONCLUSION**

The *Model Court Rule on Insurance Disclosure* would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Robert D. Welden, Chair  
Standing Committee on Client Protection  
August 2004

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<sup>5</sup> South Dakota Rules of Professional Conduct, Rule 1.4.

<sup>6</sup> Letter dated February 27, 2004, to the Committee from the Minnesota State Bar Association Rules of Professional Conduct Committee.